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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, RECEIVER,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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January 22, 2005

QUESTIONS PRESENTED

1. Whether the Due Process Clause's requirements of "minimum contacts" with a forum state, and "fair play and substantial justice" are inapplicable when a court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process.

2. Whether it unnecessary for a party to satisfy the venue statutes when a district court has ancillary subject matter jurisdiction with regard to that claim.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. However, the Respondent, Ms. Meshulam, is a receiver appointed to collect a disgorgement judgment against Paul A. Bilzerian for the Securities and Exchange Commission. Ms. Meshulam is referred to as "Meshulam" or the "Receiver" throughout. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Ernest B. Haire, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") denying rehearing is reprinted in the Appendix at A-1. The opinion of the DC Circuit is reported at 378 F.3d 1100, and is reprinted in the Appendix at A-2. The unreported opinion of the District Court for the District of Columbia is reprinted in the Appendix at A-3.

JURISDICTION

The judgment of the DC Circuit was entered on August 13, 2004. A timely motion for rehearing was denied on October 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant constitutional and statutory provisions are the Fifth Amendment to the United States Constitution and 28 U.S.C. §§ 754, 1692, which are reprinted in the appendix at A-4.

STATEMENT OF THE CASE

This is a breach of contract action on a $1 million promissory note ("Note") secured by a Stock

Pledge Agreement that consisted of publicly traded stock and bonds of Cimetrix with an original market value of $2.3 million ("Pledge Agreement"). The Note and Pledge Agreement were signed by Haire in Tampa, Florida on July 12, 2000, in favor of Overseas Holdings Limited Partnership ("OHLP"), a partnership controlled by Terri Steffen, the wife of Paul Bilzerian. The Note contained a choice of law provision that provided the Note was governed by Florida law, and a forum-selection clause that stated, "Venue for any legal proceeding arising under this Note or the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida."

Haire was persuaded by OHLP to borrow the $1 million rather than dispose of his stock and bonds in the public market because OHLP wanted to protect the price of the 4 million shares of stock that it owned in the same public company. Prior to signing the Note and Pledge Agreement, OHLP represented, falsely as it turned out, that the $1 million of cash being used for the loan was free from claims of any creditor of OHLP, Steffen or Bilzerian. OHLP also promised that it would permit Haire to sell any or all of the pledged securities at any time to pay the Note in part or in full.

From April 10, 2001, until sometime after June 1, 2001, as the market price of the Cimetrix shares fell, Haire made several requests to OHLP for permission to sell the pledged securities to pay the Note. Permission was never granted and the value of the pledged securities decreased by nearly $2 million, twice the amount of the Note.

On May 29, 2001, OHLP and Steffen filed for bankruptcy. In December 2001, when Steffen and OHLP entered into a settlement agreement with the SEC and the Receiver, Haire learned that the representations made by OHLP were false and that it knew or should have known they were false.

On January 16, 2002, the DC Court approved an assignment of the Note and Pledge Agreement by OHLP to Meshulam. The assignment provides that OHLP shall be entitled to 30% of the proceeds from the Note. OHLP also agreed to dismiss its bankruptcy case.

On May 9, 2002, shortly after OHLP dismissed its bankruptcy case, in accordance with the Note's mandatory forum-selection clause, Haire sued OHLP in state court in Florida for breach of contract, negligent misrepresentation, and fraudulent misrepresentation with respect to the Note and Pledge Agreement ("Florida Action"). The complaint in the Florida Action seeks all remedies available at law or equity, including rescission and damages. Haire was prohibited from naming the Receiver by the DC Court order that appointed her. However, Haire invited the Receiver to intervene, but she declined.

On June 19, 2002, ignoring the forum selection clause, Meshulam sued Haire in the DC Court for failing to pay the Note. On September 25, 2002, Haire waived service of the summons. On November 4, 2002, prior to the date Haire's answer was due, Meshulam filed a motion for summary judgment. On November 18, 2002, Haire filed a Motion to Dismiss for, among

other things, lack of personal jurisdiction, improper venue, and failing to name OHLP as an indispensable party ("Motion to Dismiss").

On January 17, 2003, the DC Court denied Haire's Motion to Dismiss on the grounds that it had personal jurisdiction over him pursuant to 28 U.S.C. § 1692, which the court held allowed nationwide service of process. With respect to venue, the district court found that venue was proper in the District of Columbia for any action that related to the receivership estate and that the forum-selection clause did not apply because the law required venue in the District of Columbia. The DC Court also found that OHLP was not an indispensable party.

On July 17, 2003, the district court granted Meshulam's motion for summary judgment. On appeal, the DC Circuit affirmed in a published opinion.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve a Conflict among Ten Circuit Courts with Respect to Whether a Statute That Provides for Nationwide Service Is Subject to the "Minimum Contacts" and "Fair Play and Substantial Justice" Due Process Requirements.[1]

The DC Circuit held that the Due Process Clause's requirements that a defendant have some "minimum contacts" with a forum state or federal district, and that a court's exercise of personal jurisdiction be consistent with "fair play and substantial justice" are inapplicable when a federal statute authorizes nationwide service. *Opinion* at 11, fn.8. If a defendant is served with the complaint within the United States, the Due Process Clause is automatically satisfied. The DC Circuit's decision is in accord with a majority of circuit courts. See Driver v. Helms, 577 F.2d 147, 157 (1st Cir.1978); Trans-Asiatic v. Apex Oil Company, 743 F.2d 956, 959 (1st Cir.1984); Mariash v. Morrill, 496 F.2d 1138, 1143 (2nd Cir.1974); Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1257-58 (5th Cir.1994); Bellaire General Hospital v. Blue Cross Blue Shield, 97 F.3d 822, 825-826 (5th Cir.1996); Haile v. Henderson, 657 F.2d 816, 824-826 (6th Cir.1981); NGS American, Inc. v.

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[1]Petitioner has not separately raised the following issue because it is fairly included: whether 28 U.S.C. § 1692 authorizes a district court to obtain *in personam* jurisdiction over a defendant served in a district outside its territorial boundaries. *See Opinion* at 4-11.

Jefferson, 218 F.3d 519, 524 fn.5 (6th Cir.2000); Medical Mutual of Ohio v. deSoto, 245 F.3d 561, 566-568 (6th Cir.2001); Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1035-1036 (7th Cir.2000); In re Federal Fountain, Inc., 165 F.3d 600 (8th Cir.1999) (en banc); Action Embroidery Corporation v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1178-1180 (9th Cir.2004).

Two circuit courts have disagreed, holding that due process requires something more than service of the complaint within the United States. See Peay v. Bellsouth Medical Assistance Plan, 205 F.3d 1206, 1211-12 (10th Cir.2000); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 947 (11th Cir.1997)("A defendant's 'minimum contacts' with the United States do not . . . automatically satisfy the due process requirements of the Fifth Amendment.").

The Third Circuit addressed the issue and assumed, without deciding, that due process requires more than the mere service of a complaint somewhere within the United States. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 370-71 fn.2 (3rd Cir.2002). The Fourth Circuit addressed the issue and, after quoting and citing the Eleventh Circuit's decision in Republic of Panama, concluded that "when a defendant is located within the United States, he must look primarily to federal venue requirements for protection from onerous litigation." ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626-627 (4th Cir.1997).[2]

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[2]In a more recent case, the Fourth Circuit decided a case involving a federal receiver and commented that the district

The disagreement over this issue is even greater than the circuit split indicates. Several circuit courts in the majority have had strong dissents. In Busch v. Buchman, the majority adopted the "national contacts" test but Judge Garza stated in dissent:

> [The] fundamental differences between subject matter and personal jurisdiction undermine the majority's Due Process analysis. . . . I disagree . . . with the majority's conclusion that "sovereignty may remain germane in determining personal jurisdiction because it defines the scope of the due process analysis." Personal jurisdiction represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Because the personal jurisdiction requirement is a function of the individual liberty interest, the proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating in a distant or inconvenient forum. Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect that interest.

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court's *in rem* jurisdiction over property of a receivership does not equate to personal jurisdiction over persons in other districts. Gilchrist v. General Electric Capital Corporation, 262 F.3d 295, 301 (4th Cir.2001).

Busch, 11 F.3d at 1259 (Garza, J., dissenting) (citations and quotations omitted).

Shortly after Busch was decided, another panel of the Fifth Circuit addressed the issue in Bellaire Gen. Hosp. and expressed "grave misgivings regarding the authority upon which we rely." The court stated:

> Although we dutifully apply Busch, we emphasize our disagreement with it to the extent it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual and the national sovereign. We view personal jurisdiction and service of process as conceptually distinct issues. We fail to apprehend how personal jurisdiction can be separated from due process by Congressional enactment of nationwide service of process provisions. *See id.* at 1259 (Garza, J., dissenting); see also Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F.Supp. 1102, 1106 (S.D.Ga.1994) ("To allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary is nonsensical. . . . To say that due process has no place in a personal jurisdiction inquiry seems contrary to the whole concept of due process."). It is far from clear to us that Blue Cross, a corporation operating exclusively within

> the State of Michigan, had sufficient contacts with the State of Texas to permit the district court to exercise personal jurisdiction over it under the traditional personal jurisdiction analysis, i.e., whether the defendant has had minimum contacts with the forum and whether maintenance of the action in the forum will offend traditional notions of fair play and substantial justice. See International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Thus, though we follow Busch today and find that the district court properly exercised personal jurisdiction over Blue Cross in this case, we do so with grave misgivings regarding the authority upon which we rely.

Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d at 826 (citations and quotations omitted).

The Sixth Circuit decided Haile v. Henderson Nat'l Bank over a strong dissent by Judge Keith, who wrote:

> The majority opinion holds that Congress may require a citizen to submit to the jurisdiction of any one of the 95 federal district courts in this country without regard to whether the citizen has had previous contact with a particular jurisdiction. . . . The court. in refusing to apply a "minimum contacts" analysis to the facts of this case, attempts to

distinguish the Supreme Court's decision in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The majority first states that the "minimum contacts" test was not originally intended to restrict a federal court's exercise of jurisdiction over persons residing within the territorial boundaries of the United States. It then concludes that International Shoe's analysis must be limited to questions involving a state's power to compel the appearance of non-resident defendants before courts within the borders of the state. However, more recent developments in the law recognize that an analysis similar to that used in International Shoe must also be applied in federal question cases. Black v. Acme Markets, Inc., 564 F.2d 681, 686 n.8 (5th Cir. 1977); Lone Star Package Car Co. v. Baltimore and Ohio R. Co., 212 F.2d 147, 155 (5th Cir. 1954); Fraley v. Chesapeake and Ohio Ry., 397 F.2d 1, 3 (3d Cir. 1968); Oxford First Corporation v. PNC Liquidating Corp., 372 F.Supp. 559 (S.D.Iowa 1973). See also Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); United States v. Scophony Corp., 333 U.S. 795, 804 n.13, 68 S.Ct. 855, 860 n.13, 92 L.Ed. 1091 (1948). But see First Flight Company v. National Car Loading Corporation, 209 F.Supp. 730, 736 (E.D.Tenn.1962). The

due process clause of the Fifth Amendment protects citizens from the arbitrary exercise of *in personam* jurisdiction by federal courts just as the due process clause of the Fourteenth Amendment protects citizens from such action by state courts. The majority acknowledges the applicability of the Fifth Amendment's due process clause here. However, the court states that in the federal question cases, the only due process restriction on the exercise of in personam jurisdiction by federal district courts over persons residing within the United States is the notice requirement of Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny. The Mullane test, which requires "notice reasonably calculated ... to apprise interested parties of the pendency of the action," id. at 314, 70 S.Ct. at 657, defined the right protected by the Fifth Amendment's due process clause as the "fundamental right ... to be heard." Id.

It is my belief that the majority mistakes Mullane's requirement of reasonable notice as the constitutional right at issue in that case; when in fact, reasonable notice is only one means adopted by the Court to ensure that the individual's fundamental right to be heard is not abridged. Common sense

> dictates that a court cannot numbly apply Mullane's notice requirement as if notice alone assures due process. Moreover, since the decision in International Shoe, the Supreme Court has recognized that there may be other due process limitations on a federal court's exercise of in personam jurisdiction.

Haile v. Henderson, 657 F.2d at 826-29 (Keith, J., dissenting).[3]

The Eighth Circuit has issued conflicting decisions. In South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40, 44 n.10 (8th Cir.1989), the court held that due process requires "in every case" that there be minimum contacts between a defendant and the state in which he or she is expected to answer before the court that issued the process may constitutionally assume personal jurisdiction over that defendant. However, in In re Federal Fountain, Inc., the Eighth Circuit, sitting *en banc*, overruled Kansas City Southern.

In rejecting the "national contacts" test, the Tenth Circuit explained:

> [T]he personal jurisdiction requirement flows from the Due Process Clause of the Fifth Amendment and restricts judicial power in order to protect

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[3]A recent panel of the Sixth Circuit appears less than enthusiastic over the court's holding in Haile. See NGS American, Inc., 218 F.3d at 524 fn.5.

the individual's liberty interest. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). Thus, the "proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating" in an unfair or unreasonable forum. Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1259 (5th Cir.1994) (Garza, J., dissenting). "Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this interest." Id. (Garza, J., dissenting); see also Willingway Hosp., Inc. v. Blue Cross & Blue Shield, 870 F.Supp. 1102, 1106 (S.D.Ga.1994) ("To allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary[,] is nonsensical."). The Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. However, the Court has held that due process under the Fourteenth Amendment requires that "maintenance of [a] suit ... not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted). Due process limits on a court's ability to exercise jurisdiction "are

designed to protect [defendants] by providing them with fair notice that their activities will render them liable to suit in a particular forum." Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 945 (11th Cir.1997) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 470-77 (1985)). A defendant is deemed to have "fair warning" if it has "purposefully directed [its] activities at residents of the forum." Burger King Corp., 471 U.S. at 472 (internal quotation marks and citation omitted). However, even if a defendant has "minimum contacts" with the forum, due process is not satisfied unless "the assertion of personal jurisdiction would comport with fair play and substantial justice." Id. at 476 (internal quotation marks and citation omitted).

Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements "should be discarded completely when jurisdiction is asserted under a federal statute." Republic of Panama, 119 F.3d at 945. The Due Process Clauses of the Fourteenth and Fifth Amendments are virtually identical, and both "were designed to protect individual liberties from the same types of government infringement." Id. (citing Mathews v.

> Eldridge, 424 U.S. 319, 331-32 (1976)). Accordingly, we hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment "protects individual litigants against the burdens of litigation in an unduly inconvenient forum." Id.

Peay v. Bellsouth Medical Assistance Plan, 205 F.3d at 1211-12.

Several courts have noted the conflict amongst the circuit courts and have observed that the Supreme Court has yet to address this issue. See NGS American, 218 F.3d at 524 fn.5 ("The Supreme Court has never squarely decided whether the Fifth Amendment due process is satisfied merely by national contact under a nationwide service of process provision."); Medical Mutual of Ohio, 245 F.3d at568 fn.4 ("Our conclusion is not universally adopted among the circuits . . . The Tenth and Eleventh Circuits . . . have recently rejected this view"); Sheet Metal Workers' National Pension Fund, 212 F.3d at 1036 ("the tenth circuit has concluded that the defendant must have adequate contacts with the federal district in which the litigation will occur, and not just with the United States as a whole"). As this Court has explained, the Due Process Clause exists, in part, to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where

that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This Court should resolve the conflict between the circuit courts over this important due process issue and return this important element of predictability to the federal legal system.[4]

[4]If the Court grants this Petition, Haire will either accept counsel that the Court appoints to represent him, or he will hire qualified counsel to complete the briefs and present oral argument on his behalf.

II. The Court Should Determine Whether it Is Unnecessary to Satisfy the Venue Statutes When a District Court Has Ancillary Subject Matter Jurisdiction over a Claim.[5]

It is undisputed that the complaint in this case does not satisfy the requirements of any venue statute. It is also undisputed that the complaint does not seek to resolve any dispute over the ownership or possession of receivership property. Nonetheless, the DC Circuit, relying on the Sixth Circuit's decision in Haile v. Henderson, held that when a district court has ancillary subject matter jurisdiction over a claim or a party, it is unnecessary to satisfy the venue statutes. *Opinion* at 12.[6]

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[5]Petitioner has not separately raised the following issue because it is fairly included: Whether a valid forum selection clause in a contract automatically becomes unenforceable whenever one of the parties to the contract assigns his rights to a federal receiver. The DC Circuit held that the forum selection clause in the contract should be disregarded because the law *requires* venue in the District of Columbia for any action brought by the receiver. *Opinion* at 12-13. However, any determination that ancillary venue is proper in the District of Columbia is by no means a *requirement* that venue must be in the District of Columbia. Section 754 plainly states that a receiver "shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title." 28 U.S.C. § 754.

[6]Section 754, which addresses *in rem* subject matter jurisdiction, specifically authorizes suits in districts other than that of the appointing court. Section 1692 only addresses service of process and not venue. If Congress had wanted to provide venue in the appointing court for *all actions brought by a receiver*, it could easily have done so but it did not.

This Court has stated, "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." Olberding, Doing Business as Vess Transfer v. Illinois Central Railroad, 346 U.S. 338, 340 (1953). Contrary to this Court's instruction, the DC Circuit's decision improperly blends three distinct inquiries concerning subject matter jurisdiction, personal jurisdiction, and venue.[7]

Other circuit courts have correctly noted that "[v]enue is distinct from jurisdiction. Venue may be proper or improper, independent of questions of subject matter or personal jurisdiction." Driscoll v. New Orleans Steamboat Company, 633 F.2d 1158, 1159 fn. 1 (5th Cir.1981); also see Farmers Elevator Mutual Insurance v. Carl J. Austad & Sons, 343 F.2d 7, 11 (8th Cir.1965) ("jurisdiction of the subject matter . . . is not equivalent in meaning to Venue. . . . The terms 'jurisdiction' and 'venue' should not be confused. . . . Because of [their] fundamental differences, the tests to be applied in determining whether there is jurisdiction of the subject matter do not necessarily control the resolution of venue questions.")(citations and quotations omitted).

This Court should resolve whether a party can avoid complying with the venue statutes when the district court determines it has ancillary subject matter jurisdiction over its claim.

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[7]A court appointing a receiver will invariably have subject matter jurisdiction over disputes involving receivership property.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 22, 2005